YUPAPORN SEANGARTHIT

v.

NEIL ALLAN CAMPBELL WEBB

COURT OF APPEAL, KUALA LUMPUR
DATO' MAHADEV SHANKAR JCA
DATO' DR ZAKARIA BIN MOHD YATIM JCA
DATO' N.H. CHAN JCA
[CIVIL APPEAL NO. B-08-11 OF 1995]
20 FEBRUARY 1995

PRACTICE & PROCEDURE: *Appeal - Appeal record - Filing of - Effect of O. 49 r. 6(3) Subordinate Courts Rules 1980 - Whether filing of memorandum of appeal dispensed with - Requirement of O. 55 r. 2 Rules of the High Court 1980 - Whether abrogated by O. 49 r. 6(3) Subordinate Courts Rules 1980.*

The respondent (Webb) had sued the appellant in the Magistrate's Court for breach of contract, and 19 November 1993 obtained summary judgment pursuant to O. 26 Subordinate Courts Rules 1980 (SCR). On 29 November 1993, the appellant filed and served her notice of appeal. On 15 December 1993 the appeal record was filed pursuant to O. 49 r. 6 of the SCR. The appeal record, in purported compliance with the said O. 49, did not include the notes of evidence, grounds of judgment or memorandum of appeal. The appeal was duly registered and fixed for disposal on 7 December 1994. However, on 6 December 1994, a day before the hearing, Webb's solicitors gave notice that they would take a preliminary objection to the appeal on the ground that the memorandum of appeal had not been served pursuant to O. 55 Rules of the High Court 1980. Before the learned Judge, Counsel for the appellant argued that the effect of O. 49 r. 6(3) of the SCR was to dispense with the need for a memorandum since the appeal was merely by way of rehearing of the respondent's application. The Judge disagreed and hence dismissed the appeal. The appellant applied to the Court of Appeal for leave to appeal against the order of dismissal and virtually raised the same submission she made in the Court below.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] The objective of O. 49 r. 6 is to reduce delay caused by the registration of appeals by the non-availability of the grounds of decision and notes of evidence which can take a long time. So for orders obtained before trial parties were allowed to compile the record by merely including the pleadings, and the decision appealed from together with the written application therefor. Once the appeal was registered the grounds of judgment and notes of evidence could come later. Order 49 r. 6(3) cannot be understood to have abrogated the requirement of O. 55 r. 2 Rules of the High Court 1980.

[2] In the present case Form 141 was served on the appellant's solicitors on 3 January 1994. They should have followed up by filing and serving the memorandum of appeal within 14 days thereafter together with the appeal record. This they did not do. Without the memorandum it is difficult to see how the trial Judge could have done anything but to dismiss the appeal.

[3] This was not a fit case to give leave to appeal. The proper application here was for extension of time, and that application should have been made to the High Court.

[Application dismissed].

***[Bahasa Malaysia** Translation of Headnotes]*

***AMALAN & PROSEDUR:** Rayuan - Rekod rayuan - Pemfailan - Kesan A. 49 k. 6(3) Kaedah-Kaedah Mahkamah Rendah 1980 - Samada pemfailan memorandum rayuan tidak lagi perlu - Kehendak A. 55 k. 2 Kaedah-kaedah Mahkamah Tinggi 1980 - Samada dibatalkan oleh A. 49 k. 6(3) Kaedah-kaedah Mahkamah Rendah 1980.*

Responden (Webb) telah mendakwa perayu dalam Mahkamah Majistret atas memungkiri kontrak, dan pada 19 November 1993 telah mendapatkan penghakiman terus selaras dengan A. 26, Kaedah-kaedah Mahkamah Rendah 1980 (SCR). Pada 29 November 1993, perayu telah memfailkan dan menyampaikan notis rayuannya. Pada 15 Disember 1993 rekod rayuan telah difailkan selaras dengan A. 49 k. 6 Kaedah-kaedah Mahkamah Rendah. Rekod rayuan tersebut, dalam bertujuan untuk mematuhi A. 49 tersebut, tidak memasukkan nota-nota keterangan, alasan-alasan penghakiman atau memorandum rayuan. Rayuan tersebut telah didaftarkan dan ditetapkan untuk penyelesaian pada 7 Disember 1994. Walaubagaimana pun, pada 6 Disember 1994, satu hari sebelum perbicaraan tersebut, peguamcara Webb memberikan notis bahawa mereka akan mengambil bantahan awal kepada rayuan tersebut atas alasan bahawa memorandum rayuan telah tidak disampaikan selaras dengan A. 55 Kaedah-kaedah Mahkamah Tinggi 1980. Di hadapan Tuan Hakim yang bijaksana, Peguam bagi pihak perayu telah berhujah bahawa kesan A. 49 k. 6(3) Kaedah-kaedah Mahkamah Rendah adalah menolak keperluan memorandum oleh kerana rayuan tersebut adalah semata-mata melalui perbicaraan semula permohonan respondent. Hakim telah tidak bersetuju dan justeru itu telah menolak rayuan tersebut. Perayu telah memohon kepada Mahkamah Rayuan untuk kebenaran bagi merayu terhadap perintah penolakan dan pada hakikatnya telah membangkitkan pnghujahan yang sama yang telah beliau buat dalam Mahkamah di bawah.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Objektif A. 49 k. 6 ialah untuk mengurangkan kelewatan yang telah disebabkan oleh pendaftaran rayuan-rayuan kerana ketiadaan alasan-alasan ketetapan dan nota-nota keterangan yang mana kelewatan ini boleh memakan masa yang agak lama. Oleh itu bagi perintah-perintah yang diperolehi sebelum perbicaraan, pihak-pihak adalah dibenarkan untuk menyusun rekod tersebut hanya dengan memasukkan pliding-pliding dan keputusan-keputusan yang dirayui bersama-sama dengan permohonan bertulis. Sebaik sahaja rayuan itu telah didaftarkan, alasan-alasan penghakiman dan nota-nota keterangan boleh dikemukakan kemudian. Aturan 49 Kaedah 6(3) tidak boleh difahamkan sebagai telah membatalkan kehendak-kehendak A. 55 k. 2 Kaedah-kaedah Mahkamah Tinggi 1980.

[2] Dalam kes semasa ini Borang 141 telah disampaikan kepada peguamcara perayu pada 3 Januari 1994. Mereka seharusnya menyusul dengan memfailkan dan menyampaikan memorandum rayuan dalam tempoh 14 hari selepas itu, bersama-sama dengan rekod rayuan. Ini tidak dilakukan oleh mereka. Tanpa memorandum tersebut ianya adalah agak sukar untuk memikirkan bagaimana Hakim perbicaraan boleh melakukan apa pun melainkan menolak rayuan tersebut.

[3] Ini bukannya merupakan kes yang sesuai untuk membenarkan rayuan. Permohonan yang wajar di sini adalah untuk perlanjutan masa, dan bahawa permohonan seharusnya dibuat kepada Mahkamah Tinggi.

[Permohonan ditolak].

Cases referred to:
Syarikat Kayu Bersatu Sdn. Bhd. & 2 Ors v. UMW (Sarawak) Sdn. Bhd. [1995] 1 CLJ 113 ***(aff)***
Siang Galau v. Ang Wak Hiong [1994] 1 MLJ 42 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 55 r. 2
Subordinate Courts Rules 1980 O. 26, O. 49 r. 6(3)

For the appellant - Norhaslinda bte Salleh, M/s. Xavier Rafie & Norhaslinda
For the respondent - James Edwin Pusparatnam; M/s. James Edwin & Co.

JUDGMENT

Mahadev Shankar JCA:

This is an application for leave to appeal against the decision of the High Court Judge at Shah Alam, dismissing the applicant's appeal. It has proven once again that O. 49 r. 6 of the Subordinate Courts Rules 1980 (SCR) is a trap for the unwary.

The respondent (Webb) sued the appellant in the Magistrate's Court for RM23,000 special damages, interest and costs. The claim was based on a alleged breach of contract. The appellant filed a defence and counterclaim. Webb applied for and obtained summary judgment on 19 November 1993 pursuant to O. 26 of the SCR.

On 29 November 1993 (i.e. within 14 days) the appellant filed and served her notice of appeal.

On 15 December 1993 she filed her appeal record pursuant to O. 49 r. 6 of the SCR. It reads as follows:

> (6)(1) Notwithstanding anything contained in this order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.
>
> (2) The appeal shall be brought by filling a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.
>
> (3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of:
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> (a) the application for the decision;
>
> (b) the statement of claim, and where defence has been filed, the statement of defence;
>
> (c) all affidavits filed in support of or in opposition to the application; and
>
> (d) the decision appealed from.

but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

The appeal record did not include the notes of evidence, grounds of judgment or any memorandum of appeal.

On 27 December 1993 the Senior Assistant Registrar of the High Court sent a letter to the solicitors of both parties to say the record had been received on 15 December 1993 and the appeal had been registered as Rayuan Suit No. 22-21-1993.

The appellant's solicitors did not take any further action. In due course the appeal was fixed for disposal on 7 December 1994.

On 6 December 1994 Webb's solicitors served a written notice that they would take a preliminary objection to the appeal on the ground that the memorandum of appeal had not been served pursuant to O. 55 of the Rules of the High Court 1980.

This point was taken at the hearing the following day. Appellant's Counsel submitted that the effect of O. 49 r. 6(3) of the S.C.R was to dispense with the need for a memorandum of appeal since the appeal was merely by way of a rehearing of Webb's application and there had been no trial since this was an interlocutory application.

The trial Judge did not agree and dismissed the appeal with costs. In order to mount an appeal against this decision the appellant has come to us for leave.

Before us appellant's Counsel made the same submission she made in the Court below. It did not find favour with us.

The issue is admirably covered in the *Syarikat Kayu Bersatu Sdn. Bhd. & 2 Ors v. UMW (Sarawak) Sdn. Bhd.* [1995] 1 CLJ 113 by Y.A. Tuan Richard Malanjum J. We entirely agree with what he has said.

Although O. 49 r. 6(3) could have been more clearly worded it cannot be we understood to mean that it has abrogated the requirement of O. 55 r. 2 of the Rules of the High Court 1980.

In the present case Form 141 was served on the appellant's solicitors on 3 January 1994. They should have followed up by filing and serving the memorandum of appeal within 14 days thereafter together with a copy of the appeal record. This they did not do.

The Memorandum of Appeal is not part of the appeal record (see *Siang Galau v. Ang Wak Hiong* [1994] 1 MLJ 42]. Regrettably Webb's solicitors did not tell the appellant's solicitors on or about 18 January 1994 that they would take this objection. They waited till 6 January 1994.

By then a whole year had elapsed and without the memorandum it is difficult to see how the trial Judge could have done anything else but to dismiss the appeal.

The amendment to O. 49 r. 6 was brought into effect by PU(A)193/93. Its objective was to reduce the delay caused in the registration of appeals by the non-availability of the grounds of decision and notes of evidence which can take a long time in the lower Courts. So for orders obtained before trial parties were allowed to compile the record by merely including the pleadings, affidavits, and the decision appealed from together with the written application therefor. Once the appeal was registered, the grounds of judgment and notes of evidence could come later.

The present case shows the confusion that has arisen by the exclusion provided. What appellant's Counsel could have done in the High Court was to apply for an extention of time to file the memorandum. Bearing in mind the fact that notice of objection had been given only the day before, the High Court Judge may readily have agreed.

In the circumstances this was not a fit case to give leave to appeal. The proper application here was for extension of time and that application should have been made in the High Court.

So we dismissed the application with costs.